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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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VIA HAND DELIVERY

Ms. Magalie Salas
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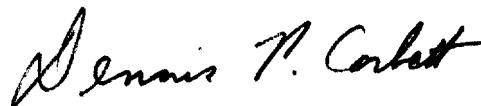
Re: MM Docket No. 87-268

Dear Ms. Salas:

On behalf of Davis Television Pittsburg, LLC, applicant for a construction permit for Channel 14 at Pittsburg, Kansas, Davis Television Corpus Christi, LLC, applicant for a construction permit for a new television broadcast station to operate on Channel 38 at Corpus Christi, Texas, Davis Television Topeka, LLC, applicant for a construction permit for Channel 43 at Topeka, Kansas, and Davis Television Duluth LLC, applicant for a construction permit for Channel 27 at Duluth, Minnesota, I am transmitting herewith an original and eleven copies of their Consolidated Reply to Oppositions to Petition for Reconsideration in the above-referenced proceeding.

Should there be any questions concerning this matter, please contact the undersigned.

Very truly yours,



Dennis P. Corbett

DPC:kbs
Enclosures
cc: Mr. Keith Larson

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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

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JUN - 5 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Advanced Television Systems and)
Their Impact Upon the Existing)
Television Broadcast Service)

MM Docket No. 87-268

To: The Commission

**CONSOLIDATED REPLY TO OPPOSITIONS
TO PETITION FOR RECONSIDERATION**

Davis Television Pittsburg, LLC, Davis Television Corpus Christi, LLC, Davis Television Topeka, LLC, and Davis Television Duluth, LLC (collectively, "Davis TV"), hereby submit a consolidated reply to three separate Oppositions filed against Davis TV's April 20, 1998 Petition for Reconsideration ("Reconsideration Petition") of the Commission's February 23, 1998 Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order, FCC 98-24 ("Reconsideration MO&O"), in the above-captioned proceeding. In support whereof, the following is shown.^{1/}

^{1/} The Oppositions were filed by Montgomery Communications, Inc. ("Montgomery"), Northeast Kansas Broadcast Service, Inc. ("Northeast"), and Channel 3 of Corpus Christi, Inc. ("Channel 3"). Under 47 C.F.R. § 1.429(g), this Reply is being filed within ten (10) days of the due date for oppositions and is therefore timely.

I. BACKGROUND

In its Reconsideration Petition, Davis TV sought limited relief from the Reconsideration MO&O, proposing to substitute NTSC channels for allotments in four communities for which Davis TV has timely submitted construction permit applications. All four of these allotments had been adversely affected by the allotment of new "paired" DTV channels for incumbent licensees. Specifically, Davis TV has requested the substitution of Channel 59 for Channel 14 at Pittsburg, Kansas; Channel 56 for Channel 38 at Corpus Christi, Texas; Channel 55 for Channel 43 at Topeka, Kansas; and Channel 31 for Channel 27 at Duluth, Minnesota. Davis TV justified its Reconsideration Petition in part on the basis of a supervening statutory event — passage of Section 309(l) of the Communications Act (as part of the Balanced Budget Act of 1997 ("Balanced Budget Act")) which very broadly requires the Commission to waive regulations standing in the way of the effectuation of settlement agreements between and among applicants who filed their applications before July 1, 1997. Davis TV explained that it would bring needed, new over-the-air service to the public in an expeditious manner without disrupting the DTV conversion process at all.

Montgomery focuses on Davis TV's proposed NTSC channel substitution in Topeka. Montgomery contends that under the relevant technical rules, there is no need to substitute Channel 55 for Channel 43 at Topeka. Northeast and Channel 3 launch more broad based attacks on the basic concept of channel substitution, alleging that this proceeding is not the appropriate forum for such changes and expressing fears that a grant of Davis TV's requested

relief would “derail” the delicately balanced DTV conversion structure. None of the arguments raised by Davis TV’s opponents justifies denial of the relief requested by Davis TV.

**II. THE TRANSPARENT, PRIVATE INTERESTS OF DAVIS TV’S
OPPONENTS PROVIDE NO PUBLIC INTEREST JUSTIFICATION
FOR DENYING DAVIS TV’S REQUESTED RELIEF**

A. Montgomery

As Davis TV acknowledged in its Reconsideration Petition, Montgomery apparently filed an application for Channel 43 at Topeka on August 20, 1997, after the June 30, 1997 deadline established in the Balanced Budget Act for applications entitled to benefit from the 180-day settlement window established in that legislation. Davis TV stated that while it believed it had already made a compelling case for grant of, inter alia, its “singleton” Topeka application, if the Commission decided for any reason to process Montgomery’s application, Davis TV and Montgomery should be treated as the only applicants for the channel. Montgomery now argues that because Davis TV’s application has not yet been accepted for filing due to the DTV “freeze,” “then perhaps fulfillment of the purpose of the freeze dictates that the allotment be deleted altogether rather than changed to something entirely new” (Montgomery Opposition at 2); criticizes Davis TV for proposing an “out of core” substitute channel for Channel 43 at Topeka; and speculates that Davis TV does not want to construct a Topeka television station on Channel 43.

Montgomery’s suggestion — from an entity that purports to want to build a new full power station on Channel 43 — that Channel 43 should simply be deleted, is peculiar at best.

Montgomery's true motivation for such a suicidal proposition apparently derives from the fact, disclosed by Montgomery in footnote 10 of its Opposition, that Montgomery currently holds a low power television station license in the Topeka market. Indeed, that low power station (K43EO) is on Channel 43 at Topeka. As such, Montgomery stands to reap a benefit if full power Channel 43 disappears and Montgomery does not have to adapt to the displacement that would be caused by Davis TV. Montgomery's patently self-serving stance on this issue should be disregarded.

Montgomery also mischaracterizes Davis TV's position with respect to Channel 43. Davis TV proposed the substitution of Channel 55 at Topeka because of the allocation complexities introduced by the allotment of DTV Channel 39 at Lawrence, Kansas. Davis TV never stated that it was not interested in constructing a station on Channel 43. Quite the opposite is true. See Reconsideration Petition at note 7. Throughout this proceeding, it has gone to extraordinary lengths to preserve its chances of building new TV stations. See Reconsideration Petition at note 2. Davis TV remains committed to constructing a new station at Topeka — on Channel 43, Channel 55, or any other substitute channel the FCC allots. As the attached Engineering Statement of Bernard R. Segal attests, however, Davis TV had come to the conclusion that a substitute channel is the most appropriate course to pursue. Montgomery's Opposition does nothing to change that, because Montgomery's engineering analysis fails to take into account the Commission's apparent decision to ignore Topeka NTSC Channel 43 in making

DTV allotments. If, however, the Commission agrees with Montgomery that NTSC Channel 43 can be used at Topeka, Davis TV will be quite content to construct its station on that channel.^{2/}

B. Northeast and Channel 3

In pleadings that are virtually identical to each other, incumbent full-power licensees in Topeka and Corpus Christi have challenged Davis TV's proposed channel substitutions in those communities. It is an all-too-familiar scenario. Incumbent licensees attempt to protect their "turf" and preclude new competition under the guise of the public interest. In this instance, these protectionist efforts clearly fail. Indeed, they only serve to highlight the need for the introduction of new full power service in these clearly underserved markets.

According to Broadcasting & Cable Yearbook 1998, Topeka, the 139th ranked DMA, is served by full power commercial stations on Channel 27 (NBC affiliate), Northeast's Channel 49 (ABC affiliate), and Channel 13 (CBS affiliate), with one full power noncommercial station on Channel 11. Similarly, Corpus Christi, the 127th ranked DMA, is served by full power commercial stations on Channel 6 (NBC affiliate), Channel 3 (ABC affiliate), Channel 10 (CBS affiliate), and Channel 28 (Univision affiliate), with one full power noncommercial station on Channel 16. Neither market lays claim to a full power Fox, WB or UPN affiliate. Even by the standards of today's broadcast television industry, much less the

^{2/} While Davis TV acknowledges that building a station "out of core" is less desirable than doing so "in core," Davis TV is willing to proceed out of core in pursuit of the public interest in bringing a new service to Topeka. Davis TV is satisfied that the Commission has now provided a satisfactory "road map" for later relocating to a core channel. See Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order, FCC 98-23, released February 23, 1998, at ¶¶ 10-16.

industry of the future, these two markets are classically underserved. While Northeast and Channel 3 would obviously greatly prefer to maintain such a status quo, the public interest demands quite a different result. The Commission should do whatever it can not to "lock in" a competitively substandard channel allotment configuration.

Northeast and Channel 3 raise two substantive challenges to Davis TV's Reconsideration Petition. First, they contend that the DTV proceeding is the wrong forum for evaluating changes to the NTSC allotment table. This argument is completely off the mark. Davis TV's Reconsideration Petition was itself necessitated by de facto changes to the NTSC Table of Allotments made by the FCC in the course of adopting the new DTV allotment table. It is therefore specious to argue that the NTSC Table is beyond the scope of this proceeding. The DTV and NTSC tables, and how they fit together, are at the very heart of this proceeding. When the Commission makes a DTV allotment that effectively eliminates an existing NTSC allotment for which applications have been filed, the Commission necessarily has the flexibility to make a substitute NTSC allotment.^{3/}

^{3/} See Report and Order in ET Docket No. 97-157, 63 Fed. Reg. 6669 (1998) at ¶ 40 (in reallocating NTSC Channels 60-69, the Commission has made clear that it will provide a filing window for specification of replacement NTSC channels).

Northeast and Channel 3's invocation of the "logical outgrowth" rule is both factually incorrect and inapposite. The logical outgrowth doctrine states that changes from a proposed rule do not require an additional round of commentary where the final rule represents a "logical outgrowth" of the proposed rule. *Action Alliance of Senior Citizens of Greater Philadelphia v. Bowen*, 846 F.2d 1449, 1455 (D.C. Cir. 1988). For the reasons set forth above, FCC adoption of substitute NTSC channels made necessary because of conflicting DTV allotments specified in this very proceeding would clearly satisfy the "logical outgrowth" test. In fact, Davis TV's comments and concerns are not merely a "logical outgrowth"

(continued...)

Second, Northeast and Channel 3 argue that because the purpose of the 1987 freeze was to maintain the status quo while DTV allotments were being worked out, no changes in NTSC allotments can now be entertained. This argument makes no chronological sense. The DTV allotment table has now been finalized (DTV construction permits are even being awarded) and the purposes of the freeze have been fully satisfied. Furthermore, Davis TV has taken pains to propose a solution that does not disturb the DTV allotment table. In other words, the freeze has outlived its usefulness and should be permanently lifted, and in any event that freeze poses no obstacle to the relief requested by Davis TV. Any suggestion that Davis TV should wait until a later date to seek an NTSC allotment remedy is a thinly disguised attempt to strangle the allotment altogether. Given the fact that DTV conversion is already well underway and given the year 2006 mandate to return all NTSC allotments, "justice delayed" in these circumstances will be "justice denied."

Northeast's and Channel 3's comments concerning the Balanced Budget Act are totally inapposite. Nowhere do they deal with the crux of Davis TV's argument — the Balanced Budget Act mandated that the Commission waive any regulations that stand in the way of effectuation of settlement agreements among applicants who filed their applications by June 30, 1997^{4/} (with no statutory requirement that such applications be accepted for filing by the FCC). By ignoring the statutorily mandated 180-day settlement window, these opponents completely

^{3/}(...continued)

of the proposed rulemaking -- they fall squarely within the ambit of this proceeding.

^{4/} Davis TV has also shown that "singleton" applications can be treated as immediately grantable under the Balanced Budget Act.

miss the essential point of Davis TV's argument. Contrary to the opponents' suggestion, by following the statutory directive to waive its regulations and allowing Davis TV to move forward to expeditiously construct new NTSC stations, the Commission will not in any way "interfere with . . . decisions about the transition to DTV." Northeast and Channel 3 Oppositions at 4. Rather, the Commission will serve the paramount public interest in the prompt initiation of much needed competitive, over-the-air television service in clearly underserved markets.

* * *

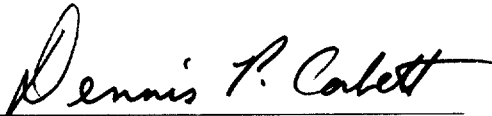
Davis TV's Reconsideration Petition presents the Commission with an opportunity to provide clear public interest benefits in the form of new, needed service to clearly underserved markets with no appreciable attendant costs. Davis TV is willing to bear the risk of finding a digital home for its NTSC channels, but it needs to secure the NTSC construction permits first. The record reflects that the only opponents of the requested relief are parties who have a vested interest in preserving the status quo. While perhaps predictable, such oppositions pose no public interest obstacle to expeditious grant of Davis TV's petition.

CONCLUSION

For the reasons set forth above and in its Reconsideration Petition, Davis TV respectfully requests reconsideration of the Reconsideration MO&O.

Respectfully submitted,

DAVIS TELEVISION PITTSBURG, LLC
DAVIS TELEVISION CORPUS CHRISTI, LLC
DAVIS TELEVISION TOPEKA, LLC
DAVIS TELEVISION DULUTH, LLC

By: 

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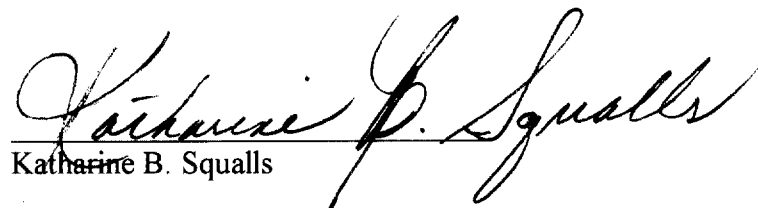
Their Attorneys

CERTIFICATE OF SERVICE

I, Katharine B. Squalls, hereby certify that a true and correct copy of the foregoing Consolidated Reply to Oppositions to Petition for Reconsideration, was sent by first-class postage prepaid mail this 5th day of June 1998 to the following:

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Katharine B. Squalls

ATTACHMENT

Bernard R. Segal, P.E.
Consulting Engineer
Washington, DC

**ENGINEERING STATEMENT
IN SUPPORT OF
REPLY TO OPPOSITION
TO DAVIS COMPANIES' PETITION
FOR RECONSIDERATION**

The instant Engineering Statement has been prepared on behalf of Davis Television Topeka, LLC, the applicant in BPCT-960920LZ for a construction permit for a new television facility for operation on Ch. 43 at Topeka, Kansas. This Statement supports Davis' Reply to the Opposition submitted by Montgomery Communications, Inc. (Montgomery) to the Davis Petition for Reconsideration of the FCC's Sixth Report and Order in MM Docket No. 87-268 relating to advanced television systems and their impact upon the existing television broadcasting service.

In its Opposition, Montgomery argues that no substitute for analog* Ch. 43 in Topeka is necessary since the Ch. 43 analog allotment is entirely consistent with the criteria employed by the Commission in making the initial DTV allotments for the transition. The undersigned does not disagree that many DTV allotments were made in the new DTV allotment table taking into account existing NTSC and certain other recognized facilities. To that extent, there is no disagreement that the current Ch. 43 Topeka NTSC allotment, had

* Analog and NTSC are used interchangeably, herein.

Bernard R. Segal, P.E.
Consulting Engineer
Washington, DC

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it been considered as part of the initial DTV allotment process, would not require consideration of a replacement. However, it is apparent from a broad review of the Commission's finally adopted DTV table that no consideration was given to NTSC allotments which were within the freeze restriction zone for the top thirty markets and for other markets for which no applications were pending by the announced cut-off date for the submission of applications for construction permit. Thus, there is the inescapable prospect that for a proposal like Davis' for Topeka that had been filed by the announced deadline date, but which was within the freeze zone of a top thirty market, dismissal might result with the allotment being deleted.

A better alternative to dismissal is the preservation of the NTSC allotment on a channel that complies with all separation criteria of Section 73.623 (d) that had been adopted in the Sixth Report and Order. By that means, even though such a channel may be out of the core, an opportunity would yet exist for providing NTSC service during the transition, and as conditions warrant near the end of the transition period, for proposing the allotment of an in core DTV companion channel.

Bernard R. Segal, P.E.
Consulting Engineer
Washington, DC

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The Montgomery pleading and its supporting engineering data take the position that the de minimis interference criterion of Section 73.623(c) is the touchstone for determining suitability of the Ch. 43 NTSC allotment for Topeka. While Montgomery may wish to believe that such an argument is persuasive, there is ample reason to believe otherwise. Given the Commission's apparent failure to consider Topeka NTSC Ch. 43 in the DTV allotment process, and that the channel may be slated for deletion with the consequent dismissal of any and all pending applications, Davis has demonstrated that an alternate channel is available that completely satisfies all criteria as if for a new allotment taking into consideration both NTSC and DTV spacing requirements.

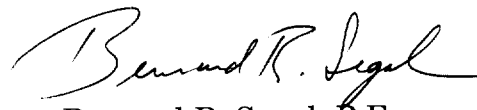
The Topeka NTSC Ch. 43 allotment does not meet the minimum separation criteria established in Section 73.623(d) of the Rules. In order to preserve an NTSC option at Topeka (and certain other locations), a replacement channel was suggested for NTSC use at Topeka (and several other locations of interest to Davis) that could have no adverse consequences relative to the old NTSC and new DTV rules.

Bernard R. Segal, P.E.
Consulting Engineer
Washington, DC

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Davis Reply

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I declare under penalty of perjury that the foregoing is true and correct. Executed on June 5, 1998.


Bernard R. Segal, P.E.